INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting the writ	9
Conclusion	22
Appendix	23

CITATIONS

Cases:

Aldridge v. *United States*, 283 U. S. 308	9
Baldwin Co. v. *Howard Co.*, 256 U. S. 35	11
Batchelor v. *Madison Park Corp.*, 25 Wash. 2d 907, 172 P. 2d 268	19
Best v. *District of Columbia*, 291 U. S. 411	9
Butterworth v. *Hoe*, 112 U. S. 50	11
Carver v. *Clephane*, 137 F. 2d 685	17
City of Roanoke v. *Elliott*, 123 Va. 393, 96 S. E. 819	13
City of Roanoke v. *Smith*, 164 Va. 65, 178 S. E. 676	13
Cochran v. *Bennett*, 37 Ga. App. 202, 139 S. E. 428	13
Davis v. *Forrester*, 188 Ga. 73, 2 S. E. 2d 601	14
Dist. of Columbia v. *Murphy*, 314 U. S. 441	10
Dist. of Columbia v. *Pace*, 320 U. S. 698	10
Dugger v. *Cox*, 110 F. 2d 834	13
Edgerton v. *Kingsland*, 168 F. 2d 128	17
Fox River Paper Co. v. *International Brotherhood*, 242 Wis. 113, 7 N. W. 2d 413	13
Gas-Light Co. of Augusta v. *West*, 78 Ga. 318	14
Hammond v. *Hull*, 131 F. 2d 23, certiorari denied, 318 U. S. 777	16
Interstate Commerce Commission v. *Oregon-Washington Rd. & Nav. Co.*, 288 U. S. 14	17
Keller v. *Potomac Electric Co.*, 261 U. S. 428	11
Loughran v. *Loughran*, 292 U. S. 216	10
National Mutual Ins. Co. v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582	11
Philadelphia Underwriters v. *Folds*, 156 Ga. 773, 120 S. E. 102	13
Postum Cereal Co. v. *California Fig Nut Co.*, 272 U. S. 693	11
Reed v. *Allen*, 286 U. S. 191	9

Cases—Continued

	Page
Securities and Exchange Commission v. *U. S. Realty Co.*, 310 U. S. 434	17
State v. *Harrington*, 3 Terry 14 (Del.) 27 A. 2d 67	13
Thomas v. *Vinson*, 153 F. 2d 636	17
Tulman v. *Committee on Admissions and Grievances*, 135 F. 2d 268	17
Washington Fidelity Ins. Co. v. *Burton*, 287 U. S. 97	9
West v. *West Va. Fair Assn.*, 97 W. Va. 10, 125 S. E. 353	13

Statutes:

Act of March 3, 1933, 47 Stat. 1482, c. 206, Title 23, c. 6	4, 10
Act of May 24, 1949, P.L. No. 72, 81st Cong., 1st Sess., c. 139, Sec. 142	14
D. C. Code:	
Title 2, Sections 123, 129, 309, 406, 407, 516, 606, 806, 810	16
Section 17-101	12, 13, 14, 25
Section 17-103	
Section 23-601	4
Section 23-602	10, 23
Sections 23-603—23-607	10
Section 23-608	4, 10, 11, 20, 23
Section 23-612	10, 11, 14, 24
28 U.S.C. 1291	14

Miscellaneous:

Funk and Wagnall's New Standard Dict. (1947), p. 105	19
Rules Regulating Practice before the Criminal Division of Municipal Court, Rule 3(c)	20
Webster's New Int. Dict., 2d ed. (1948), p. 99	19
45 Yale L. J. 918 (1936)	19

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

BOLITHA J. LAWS, CHIEF JUDGE, AND JENNINGS BAILEY, F. DICKINSON LETTS, T. ALAN GOLDSBOROUGH, JAMES W. MORRIS, DAVID A. PINE, MATTHEW F. MCGUIRE, HENRY A. SCHWEINHAUT, ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, AND EDWARD A. TAMM, DISTRICT JUDGES, COMPRISING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, PETITIONERS

v.

JOHN W. CARTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States District Court for the District of Columbia and the judges thereof, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case

on August 1, 1949, and the preliminary orders entered on June 6, and June 13, 1949.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 65-70) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1949 (R. 71). Preliminary procedural orders, involved in this case, were entered on June 6 (R. 62) and June 13, 1949 (R. 64). By order of Mr. Justice Burton, dated September 10, 1949, time for filing a petition for a writ of certiorari from the orders of June 6, and 13, 1949, was extended to and including October 29, 1949 (R. 72).[1] The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

On an *ex parte* application containing a material misrepresentation of fact, respondent was granted authority by the District Court for the District of Columbia, under the District of

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[1] Petitioners are of the view that a petition which is timely as to the judgment of August 1, 1949, is also timely as to the preliminary procedural orders of June 6, and 13, 1949, but as a precautionary measure, and in order to obviate any possible objection on the ground of timeliness to presentation of issues involving the judgment of August 1, 1949, and the procedural issues involving the orders of June 6, and 13, 1949, in the same petition, application was made for the extension of time which was granted by Mr. Justice Burton.

Columbia bondsman statute, to engage in the bonding business in criminal cases in that court. On being apprised of the probable true facts, the District Court held a hearing to discover whether a material misrepresentation had actually been made to it, and, after full hearing, made such a finding, revoked its prior approval of the application, and reinstated it in pending status to await further investigation. Thereafter, the application was denied in due course, without further hearing or proceedings. Respondent took a direct *ex parte* appeal to the Court of Appeals, which, after refusing to permit a hearing on behalf of, or any participation by, the District Court in the appellate proceedings, reversed the District Court's orders. The questions presented are:

1. Whether the District Court's orders, involving an application to engage in the bonding business in that court, are appealable to the Court of Appeals.

2. Whether the Court of Appeals properly refused the District Court any right to participate or be heard in the appellate proceedings.

3. Whether the District Court acted within its authority in denying respondent's application to engage in the bonding business in that court.

STATUTES INVOLVED

The pertinent statutes involved are set forth in the Appendix, *infra,* pp. 23-26.

STATEMENT

The District of Columbia bondsman statute (Act of March 3, 1933, 47 Stat. 1482, c. 206, D. C. Code, Title 23, c. 6) requires all persons seeking to engage in the bonding business in the criminal courts in the District of Columbia to secure special authorization from each of the courts in which they seek to carry on such business.[2] Rules and regulations providing the qualifications of bondsmen, and the terms and conditions upon which the bonding business is to be carried on, are to be adopted by each court. The criminal division of the United States District Court for the District of Columbia is designated to make orders approving such applications and to grant such authority in that court, taking into consideration, under the statute and the court rule, "both the financial responsibility and the moral qualities of the person so applying" (Section 8). Authority to act as bondsman is renewable from time to time as the court may provide (Section 8); the District Court rules make the authorization renewable every two years.[3]

On or about November 17, 1947, respondent John W. Carter filed an application with the District Court, under this statute, to engage in the bonding

[2] The statute defines the "bonding business" as the "business of becoming surety for compensation upon bonds in criminal cases in the District of Columbia, and the word 'bondsman' means any person or corporation engaged either as principal or as agent, clerk, or representative of another in such business." Section 1.

[3] The pertinent District Court rules are set forth in the Court of Appeals' opinion, at R. 66-7.

business in criminal cases in that court (R. 1-3). As part of this application, Carter stated under oath that he had "never been charged and/or convicted of any offense involving moral turpitude" (R. 2). The application was approved by the Court —acting through Judge Pine—on November 18, 1947 (R. 3).

On December 5, 1947, Judge Pine was informed for the first time that Carter had in the past been charged with several offenses, at least some of which involved moral turpitude (R. 7). A conference was had in chambers on December 8, 1947, at which the applicant's attorneys endeavored to explain the apparent discrepancy between the statement in his application and the facts later brought to the court's attention (R. 7-17). After the conference, the District Court, through Judge Pine, issued a "Rule to Show Cause" (on December 9, 1947) which specifically referred to the discrepancy between the applicant's sworn statement as to his freedom from charges and the facts as to Carter's criminal charges which had been represented to the court. The rule required Carter to show good cause on December 16, 1947, why the court's authorization of November 18 should not be revoked (R. 17).

The applicant filed an Answer to the Rule to Show Cause (R. 18-19) and a supporting affidavit (R. 20-21), and the hearing prescribed by the Rule was held on December 16, 1947, before Judge Pine

(R. 21-32). Applicant was represented by counsel.[4] Undisputed official records of indictments and charges against Carter were presented to the court (R. 28-29). One of the indictments involved a charge of receiving stolen property (R. 35-36); other charges apparently involved the offense of gaming and promotion of lotteries (R. 17).[5] Full opportunity to offer evidence was afforded to appellant but was declined (R. 27-28). Argument was had as to the meaning of applicant's statement that he had never been "charged and/or convicted of any offense involving moral turpitude."

After hearing, the court concluded that (1) the reasonable interpretation of the critical words was that Carter had represented that he had never been charged with an offense involving moral turpitude; (2) if Carter had disclosed in his application the past charges raised against him, the court would have been induced by the existence of those charges to make further inquiry and investigation to ascertain whether the applicant was a suitable person, under the law, to engage in the business of writing bonds in criminal cases; and (3) the misrepresentation had been made in good faith on ad-

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[4] Applicant's counsel filed what purported to be an Affidavit of Prejudice asking for the disqualification of Judge Pine (R. 23, 33-34), but this affidavit contained no allegation of personal bias or prejudice against Judge Pine, as applicant's attorney expressly admitted (R. 23, 26). A motion to disqualify—on the same general ground that the judge had already "made up [his] mind"—was also made at the hearing and denied (R. 22).

[5] None of these indictments or charges were prosecuted to a conviction (R. 28-29).

vice of counsel (R. 29-30). Accordingly, the court determined that its prior approval (of November 18, 1949) should be revoked, and the application reinstated "in exactly the same status it was in before the approval" (R. 30). The court announced that it would cause further investigation to be made to aid it in passing upon the application, and it also declared that it would receive any further evidence the applicant desired to submit (R. 30-32). The application was to be viewed as "an active, pending application" (R. 32). On December 19, 1947, the court entered an order revoking the approval given on November 18, 1947, to Carter's application (R. 35).

Thereafter, Carter presented to the court an affidavit and several letters in support of his application (R. 35-57). No request for further hearing was made. After consideration of the application and supporting material, and of the information rendered available to the District Court as a result of the inquiry initiated by Judge Pine, Carter's application was denied, on June 8, 1948, by the court in an order signed by the four judges then presiding in the criminal divisions of the District Court (R. 57).

On June 17, 1948, Carter filed a purported notice of appeal from the order of June 8 (R. 58). No adverse parties were named or served. The appeal was solely from the order of June 8, 1948, as it stated (R. 58). The respondent never sought review, by way of appeal or mandamus or any other

form of judicial review, from the order of December 19, 1947.

The case was argued in the Court of Appeals on behalf of the respondent, and by an Assistant United States Attorney as *amicus curiae*. The District Court was not represented.

Shortly thereafter, at the request of the District Court assembled in general term, the Solicitor General moved, on behalf of the District Court and its judges, for a hearing in the Court of Appeals and for leave to present oral argument and to file a written brief (R. 59-61). The Solicitor General also entered his appearance on behalf of the District Court and its judges (R. 65). In an order dated June 6, 1949, the Court of Appeals stated that it was treating the Solicitor General's motion "as a motion for reargument on behalf of *amicus curiae* United States Attorney in this cause," and setting the case for reargument "by said *amicus curiae*" (R. 62).

The Solicitor General then moved, on behalf of the District Court and its judges, to clarify and amend the order of June 6 so as "to provide for argument on behalf of the United States District Court for the District of Columbia and the judges thereof, rather than on behalf of the *amicus curiae* (the United States Attorney)" (R. 62-3). It was pointed out that the original motion was filed solely on behalf of the District Court and its judges, and that its purpose was to secure a hearing for the District Court and its judges and to have them

made parties for the purpose of protecting their direct interest in the disposition of this cause (R. 63). This motion was denied on June 13, 1949 (R. 64).

The matter was then argued on the merits by the Solicitor General, who, according to the Court of Appeals' opinion, "reargued on behalf of the United States Attorney as *amicus curiae*" (R. 65). The opinion, reversing the "orders of the District Court," was handed down on August 1, 1949 (R. 65-70). The mandate reversed both the order of December 19, 1947, and the order of June 8, 1948.

REASONS FOR GRANTING THE WRIT

This case presents a decided difference of view between the District Court, affirmatively petitioning this Court on its own behalf, and the Court of Appeals on an important matter directly touching the proper administration of criminal justice in the District of Columbia. As the final authority, by mandate of Congress, in all justiciable matters of judicial administration in the District of Columbia, this Court should definitively resolve the conflict and reestablish the system of licensing bail-bondsmen in the District on the footing Congress intended. However reluctant the Court may ordinarily be to take cases presenting mainly issues of local law, the unusual character of the present controversy and the nature of the questions presented justify the granting of the writ in this case.[6]

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[6] Cf. for cases reviewing matters peculiar to the District of Columbia, *Aldridge* v. *United States*, 283 U. S. 308; *Reed* v.

I

The Court of Appeals seriously erred in entertaining the purported appeal from administrative, non-judicial, orders of the District Court.

A. Spurred by certain well-known scandals connected with the professional bonding-business in the District of Columbia courts, Congress passed the Act of March 3, 1933 (37 Stat. 1482, c. 206, Title 23, c. 6, of the District of Columbia Code) to regulate that occupation and provide for its supervision. The business was declared to be "impressed with a public interest" (Section 2, Sec. 23-602 D. C. Code), strict rules were laid down for the conduct of a bondsman's activities and his relations with prisoners and attorneys (Sections 3-7, Secs. 23-603—23-607), and the criminal courts were entrusted with the qualifications, authorization, and supervision of the carrying on of the bonding-business (Sections 8, 12, Sec. 23-608, 23-612). It was made the duty of the criminal courts (a) to provide reasonable rules and regulations for the qualifications of bondsmen and the terms and conditions upon which such business was to be carried on, (b) to authorize persons to engage in the bonding-business, and in doing so to "take into consideration both the financial responsibility and the moral qualities" of the applicant, and (c) to re-

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Allen, 286 U. S. 191; *Best* v. *District of Columbia*, 291 U. S. 411; *Washington Fidelity Ins. Co.* v. *Burton*, 287 U. S. 97; *Loughran* v. *Loughran*, 292 U. S. 216; *District of Columbia* v. *Murphy*, 314 U. S. 441; *District of Columbia* v. *Pace*, 320 U. S. 698.

new from time to time the authorizations of persons engaging in the bonding-business (Section 8, Sec. 23-608). It was also expressly made the statutory duty of the criminal courts to see that the provisions of the Act are enforced (Section 12, Sec. 23-612).[7]

These provisions, and the entire structure of the bonding-business Act, make it clear, in petitioners' view, that the granting, denial, suspension, or revocation by petitioners of an application to engage in the bonding-business in that court pertains solely to the court's administrative and non-judicial functions. Because of the intimate connection of professional bondsmen with the proper administration of criminal justice, Congress entrusted the criminal courts with the task of overseeing their qualifications, good conduct, and business activities, and strongly emphasized its purpose to impose administrative and non-judicial duties on these courts by specifically making it their duty "to see that this Act is enforced" (Section 12, Sec. 23-612), a requirement peculiarly appropriate to the execution of administrative functions.[8]

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[7] Section 12 (Sec. 23-612) likewise provides that "upon the impaneling of each grand jury in the District Court of the United States for the District of Columbia it shall be the duty of the judge impaneling said jury to give it in charge to the jury to investigate the manner in which this chapter [*i.e.*, the Act of March 3, 1933] is enforced and all violations thereof."

[8] Congress may, of course, confer purely administrative powers on the District Court for the District of Columbia. *Butterworth* v. *Hoe*, 112 U. S. 50; *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428,

It necessarily follows that no action of petitioners in granting, denying, suspending, or revoking a bonding-business application is directly appealable to the Court of Appeals, any more than other administrative action of the District Court would be. The bondsman statute does not itself provide, either expressly or by implication, for any appellate review, and respondent is forced to rely on the general appeal provisions of Section 17-101 of the D. C. Code, Appendix, *infra*, pp. 25-26 ("any party aggrieved by any final order, judgment, or decree of the District Court * * * may appeal therefrom to the said United States Court of Appeals * * *"), which plainly governs only *judicial* orders, judgments, or decrees, and was not designed to cover the District Court's administrative orders like that involved here.

This conclusion is required by the established principles of appellate review which are best illustrated, for present purposes, by examples from state jurisprudence. For in many states of the Union the legislature has imposed various administrative duties, akin to that with which we are now concerned, upon the lower courts; and the case reports of these states provide forceful analogies for the conclusion that Section 17-101 does not open the doors of the Court of Appeals to appeals from nonjudicial administrative orders issued by the Dis-

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442-443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582, 616, 638-639.

trict Court. In these states, the attempt has frequently been made to seek review of such administrative orders in the higher courts through general appeal provisions comparable to Section 17-101, only to meet with rejection on the ground that these general review statutes are limited to the *judicial* orders or decrees of the lower courts. For instance, appeals or writs of error have been held unavailable to review an order setting the compensation to be paid an assistant district attorney (*City of Roanoke* v. *Smith,* 164 Va. 65, 178 S. E. 676); an order appointing a labor arbitrator (*Fox River Paper Co.* v. *International Brotherhood,* 242 Wis. 113, 7 N. W. 2d 413) or an umpire for an insurance arbitration (*Philadelphia Underwriters* v. *Folds,* 156 Ga. 773, 120 S. E. 102); an order authorizing the state banking superintendent to sell the assets of a liquidated bank (*Cochran* v. *Bennett,* 37 Ga. App. 202, 139 S. E. 428);[9] a court determination that sufficient voters had approved the adoption of the city-manager plan of government (*City of Roanoke* v. *Elliott,* 123 Va. 393, 407-413, 96 S. E. 819, 824-826); the decision of a court sitting as a board to canvass state elections (*State* v. *Harrington,* 3 Terry 14 (Del.), 27 A. 2d 67, 75); an order directing the issuance of a certificate of incorporation to a municipality or private corporation (*West* v. *West Va. Fair Assn.,* 97 W. Va. 10, 125 S. E. 353;

[9] See also *Dugger* v. *Cox,* 110 F. 2d 834, 836 (C.A. 6) (and other similar cases) holding unreviewable a federal district court's order approving the sale of the assets of an insolvent national bank.

Gas-Light Co. of Augusta v. *West,* 78 Ga. 318); or a court order declaring a certain county office vacant (*Davis* v. *Forrester,* 188 Ga. 73, 2 S. E. 2d 601).

These are all instances in which a legislature has seen fit, as here, to entrust a lower court with certain administrative, non-judicial duties, and the pervading principle is that in such circumstances the normal appeal provisions applicable to truly judicial proceedings are not available. In the light of this principle, Section 17-101 of the District of Columbia Code does not afford any rights or remedy to respondent, and his appeal—which was premised solely on that provision of the Code—should have been dismissed outright.[10] Instead, the Court of Appeals erroneously characterized the District Court's orders as "judicial" (R. 70), and entertained the appeal.

B. We are very doubtful whether the granting, denial, suspension, or revocation of an application to become a bondsman is reviewable in any form by an appellate court. Congress has specifically placed the full duty of enforcement of the professional bondsman statute on the criminal divisions of the District Court (Section 12, Sec. 23-612), and has provided for the criminal divisions of that court to appoint, regulate, and supervise the conduct of the bonding business insofar as that court is concerned. The statute thus recognizes the close

[10] Section 17-101 was repealed by section 142 of the Act of May 24, 1949, Pub. Law No. 72, 81st Cong., 1st Sess.,

relationship between the proper performance of bonding functions and the fair and efficient administration of criminal justice which is the responsibility of a criminal trial court. Because of this intimate connection, the Act has made the regulation of bonding activities an integral part of the administrative business of the District Court.[11] And the conduct of that court's administrative business—whether it be the appointment of court clerks, commissioners, members of the Board of Education, or the promulgation of practice rules, or the qualification of bondsmen conducting business in that court—is normally not a matter for any review or supervision by other tribunals.

If, however, the petitioners' action on an application to engage in the bonding-business is subject to any judicial scrutiny, it must be through a proper proceeding in the nature of mandamus or for a mandatory injunction, in which the applicant alleges and proves arbitrary or capricious action or a gross abuse of discretion, and in which petitioners are parties and can avail themselves of the right to present a response and to be heard. In such an orderly proceeding, the tribunal to whom the petition for mandatory relief is addressed has the benefit of the views and evidence offered by the District

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c. 139, but our argument is equally applicable to 28 U. S. C. 1291, which now governs appeals from the District Court to the Court of Appeals for the District of Columbia Circuit.

[11] As well as of the Municipal Court (formerly the police court) and the juvenile court—the other criminal courts in the District of Columbia.

Court and its judges, and a full adversary record, properly prepared and made up, is available for the deciding tribunal. This is the only procedure which can properly be followed in all reviewable bonding-business matters, including orders revoking a bondsman's license, since Congress has provided no other special method of review.[12] The Court of Appeals' own records reveal that, in the absence of a specific statutory mode of review or appeal, an action in the nature of mandamus or for a mandatory injunction is the only correct means of compelling administrative action, such as the award of a license or permit, or preventing its revocation or suspension. *E. g., Hammond* v. *Hull,*

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[12] Title 2 of the District of Columbia Code contains several chapters dealing with the licensing, by various boards and commissions, of certain professions and occupations (*e. g.*, medicine, healing arts, dentistry, optometry, nursing, veterinary medicine, pharmacy). In some cases, on denial of an application for a license, Congress has specifically provided for an appeal or other method of judicial review, *e. g.*, sec. 2-129 (healing art—review of certiorari in District Court); sec. 2-1110 (barbers—review by appeal to District Court); sec. 2-406 (nurses—review by certiorari); sec. 2-606 (renewal of license to sell poisons—review in Court of Appeals). In other instances, Congress has made no provision at all for judicial review on denial of a license (*e. g.*, sec. 2-309, dentistry; sec. 2-516, optometry), or has expressly made the administrative determination "final and binding" (sec. 2-806, veterinarians); in these cases, the only method of judicial review, if any, would appear to be by way of mandamus. With respect to revocation or suspension of a license, the chapters of Title 2 generally provide, in specific terms, for some type of judicial review (*e. g.*, sec. 2-123, healing art; sec. 2-407, nurses; sec. 2-810, veterinarians).

We think that a comparison of these various provisions of Title 2 with those of the professional bondsman statute shows that when Congress has desired to provide an appeal or other direct method of judicial review from the refusal or revocation

131 F. 2d 23, certiorari denied, 318 U. S. 777; *Thomas* v. *Vinson,* 153 F. 2d 636; *Edgerton* v. *Kingsland,* 168 F. 2d 128; *Carver* v. *Clephane,* 137 F. 2d 685; cf. *Tulman* v. *Committee on Admissions and Grievances,* 135 F. 2d 268. That course was not followed here, but the Court of Appeals disregarded this grave defect in procedure.

II

Despite petitioners' direct interest, conferred by statute, in the granting, denial, suspension, and revocation of bonding-business permits, the Court of Appeals not only recognized an appeal which did not name petitioners (or any other person) as appellees or adverse parties, but also twice refused petitioners the right to intervene and participate in the appellate proceedings in defense of their statutory interests (R. 62, 64). As we have pointed out (*supra,* pp. 10-11, 14-15), in matters governed by the bondsman statute the District Court and its judges act administratively—as an administrative agency comparable, in its field, to the Interstate Commerce Commission or the Securities and Exchange Commission—and they are at least equally entitled to be heard when their orders are attacked. Cf. *Interstate Commerce Commission* v. *Oregon-Washington Rd. & Nav. Co.,* 288 U. S. 14; *Securities and Exchange Commission* v. *U. S. Realty Co.,* 310

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of a license, it has so specified in the particular statute, and that in the absence of such an express provision the only remedy, if any, is by way of mandamus.

U. S. 434, 458 *ff*. There is no one else who can perform this function. For a court to entertain a challenge to an administrative order without hearing the tribunal which issued the order, or at least some other person directly interested in sustaining the order, is a non-adversary *ex parte* procedure unknown to our law. The District Court and its judges should clearly have been permitted to participate in the proceeding seeking review of their orders.[13] By like token, they have standing to present this petition for a writ of certiorari. If this were not so, there would be no method, and no person capable, of seeking correction by this Court of the Court of Appeals' errors.

III

All of the District Court's actions on Carter's application to become a bondsman in that court were fully within its authority.

A. The court had power to revoke, by its order of December 19, 1947, the *ex parte* approval previously given (on November 18, 1947) to respondent's application to engage in the bonding business in the District Court. This order of revocation was issued after a full hearing—at which the applicant, who had previously been informed of the nature of the tentative complaint against him, was fully heard through his attorneys and was permitted to present

[13] Arguments by an *amicus curiae*, though they may be helpful, are no substitute for participation by persons directly interested in the cause.

evidence—and after the court was entirely satisfied that the applicant had not correctly represented certain material facts relating to prior criminal charges which, if they had been disclosed before the approval of the application, would have led the court to make further inquiry and investigation before taking definitive action. The court's action was supported by the plain fact that respondent had made a statement in his application which would indicate to most people and to most lawyers that he had never been charged with a crime involving moral turpitude, and it later turned out that this was not so. The misrepresentation may have been made in all good faith, but it did in fact mislead the court, and the court's interpretation of the disputed words was certainly reasonable and quite forseeable.[14] And the existence of several charges involving gaming, promotion of lotteries, and receipt of stolen property undoubtedly bore directly on the applicant's "moral qualities" relevant to the conduct of a bonding business, which the statute expressly requires the court to take into consideration. *Infra,* p. 24; cf. R. 66.

Contrary to the Court of Appeals' holding, we submit that the District Court was empowered by the statute and its own rules thus (a) to revoke,

[14] See Webster's New Int. Dict., 2d ed. (1948), p. 99 ("Either *and* or *or*. 'Butter *and/or* eggs' means 'butter and eggs, or butter or eggs' " (Emphasis in original)); Funk and Wagnall's New Standard Dict. (1947), p. 105; *Batchelor* v. *Madison Park Corp.*, 25 Wash. 2d 907, 924-925, 172 P. 2d 268, 278; 45 Yale L. J. 918 (1936).

after full hearing, its approval of an application induced by even an honest, but very material, misrepresentation, (b) to reinstate the application in pending status so that the plenary investigation suggested by the true facts could be had, and (c) to treat the application thereafter as if it had never been approved. Perhaps the court could have revoked the permit outright, with finality, on account of a misrepresentation of this gravity; certainly, it could take the limited corrective action of erasing the initial approval induced by this affirmative and material misstatement. Whatever the nature of the "property" or "vested" right received by respondent as a result of the approval originally granted,[15] it was not proof against revocation, after

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[15] The statute's stress on frequent renewal of the authorization to engage in the bonding business (Section 8, Sec. 23-608) indicates the temporary character of the privilege or license, and argues strongly against the erection of this license into a property or vested right. Under the provision that the bondsman's authority shall be renewed "from time to time at such periods as the court may by rule provide," the District Court could provide for renewal at least once every year, as does the Municipal Court (Rules Regulating Practice before the Criminal Division of the Municipal Court, Rule 3(c)); or could provide for renewal every six months, or each month, or any other period the court might determine. It is plain under the statute that the bondsman does not acquire any right to such renewal, no matter how often or how infrequently he is required to make application. The result is that in effect he holds his authorization at the will and discretion of the court; and holds it temporarily and until the expiration of the period fixed by rule of court.

Because of these vital facts, the status of a bondsman is far different from that of a member of the bar, to whom the Court of Appeals refers by way of analogy (R. 69). Upon admission to the bar, an attorney acquires a permanent status which endures for life, unless he resigns or is disbarred, and is not subject to periodic renewals or relicensing.

hearing, by the issuing authority on discovery that it had been materially misled into granting the permit by the applicant's affirmative, if honest, misstatement.[16] A negligent misstatement, inducing official action, surely cannot place an applicant on a higher plane than he would have obtained had the facts been correctly stated.

B. After placing respondent's application back as an "active, pending application" (R. 32), as if it had never been approved, the District Court then had full authority to pass upon and deny the pending application without further hearing, as it did in its order of June 8, 1948 (R. 57). In connection with such applications, the court is empowered to consider all available relevant information, including confidential material, just as it has always done in passing upon applications for admission to the bar, in appointing court clerks, United States Commissioners, assignment and motion commissioners, other court officials, referees in bankruptcy, special masters, or members of the Board of Education of the District of Columbia, as well as in sentencing prisoners on the basis of non-public probation reports. Not only is it unnecessary for the court to grant a hearing to bonding-business

[16] By consistently characterizing the case as if it involved only the later discovery by the court of circumstances which, if originally known, would have caused it to make further inquiry upon the original application (R. 69, 70), the Court of Appeals wholly blurs the cardinal fact that it was respondent's affirmative misrepresentation which kept the undiscovered circumstances from the approving court's knowledge.

applicants or to inform them of derogatory information available to the court, but it would seriously undermine the effective and salutary administration of the professional bondsman statute if such requirements were to be imposed. Respondent never requested a hearing after his application was reinstated in pending status on December 19, 1947, and he could not properly claim one. He was, however, accorded full opportunity to present character and other evidence in support of his application, and that is the most to which he was entitled. Accordingly, the District Court did not transgress any of his procedural or substantive rights in ultimately denying his application, and the order of denial was amply supported by information which, in the view of the members of the court participating in that order, clearly called for such action.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1949

APPENDIX

1. The pertinent portions of the Act of March 3, 1933, 47 Stat. 1482, ch. 206 (as contained in the District of Columbia Code) are as follows:

§ 23-602 (Section 2). *Business impressed with public interest.*

The business of becoming surety for compensation upon bonds in criminal cases in the District of Columbia is impressed with a public interest.

* * * * * * *

§ 23-608 (Section 8). *Qualifications of bondsmen—Rules to be prescribed by courts—List of agents to be furnished—Renewal of authority to act.*

It shall be the duty of the police court, juvenile court, and the criminal divisions of the District Court of the United States for the District of Columbia, each to provide, under reasonable rules and regulations, the qualifications of persons and corporations applying for authority to engage in the bonding business in criminal cases in the District of Columbia, and the terms and conditions upon which such business shall be carried on, and no person or corporation shall either as principal, or as agent, clerk, or representative of another, engage in the bonding business in any such court until he shall by order of the court be authorized to do so. Such courts, in making such rules and regulations, and in granting authority to persons to engage in the bonding

business, shall take into consideration both the financial responsibility and the moral qualities of the person so applying, and no person shall be permitted to engage, either as principal or agent, in the business of becoming surety upon bonds for compensation in criminal cases, who has ever been convicted of any offense involving moral turpitude, or who is not known to be a person of good moral character. It shall be the duty of each of said courts to require every person qualifying to engage in the bonding business as principal to file with said court a list showing the name, age, and residence of each person employed by said bondsman as agent, clerk, or representative in the bonding business, and require an affidavit from each of said persons stating that said person will abide by the terms and provisions of this chapter. Each of said courts shall require the authority of each of said persons to be renewed from time to time at such periods as the court may by rule provide, and before said authority shall be renewed the court shall require from each of said persons an affidavit that since his previous qualification to engage in the bonding business he has abided by the provisions of this chapter, and any person swearing falsely in any of said affidavits shall be guilty of perjury.

* * * * * * *

§23-612 (Section 12). *Enforcement.*

It shall be the duty of the police court, juvenile court, and of the criminal divisions of the

District Court of the United States for the District of Columbia to see that this chapter is enforced, and upon the impaneling of each grand jury in the District Court of the United States for the District of Columbia it shall be the duty of the judge impaneling said jury to give it in charge to the jury to investigate the manner in which this chapter is enforced and all violations thereof.

2. Section 17-101 of the District of Columbia Code provided:

District Court and Court of Appeals.

Any party aggrieved by any final order, judgment, or decree of the District Court of the United States for the District of Columbia, or of any justice thereof, may appeal therefrom to the said United States Court of Appeals for the District of Columbia; and upon such appeal the United States Court of Appeals for the District of Columbia shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections. Appeals shall also be allowed to said United States Court of Appeals for the District of Columbia from all interlocutory orders of the District Court of the United States for the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in

the discretion of the said United States Court of Appeals for the District of Columbia, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 422

BOLITHA J. LAWS, CHIEF JUDGE, AND JENNINGS BAILEY, F. DICKINSON LETTS, T. ALAN GOLDSBOROUGH, JAMES W. MORRIS, DAVID A. PINE, MATTHEW F. McGUIRE, HENRY A. SCHWEINHAUT, ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, AND EDWARD A. TAMM, DISTRICT JUDGES, COMPRISING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Petitioners.*

v.

JOHN W. CARTER

Memorandum in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CITATIONS

	PAGE
District of Columbia v. Pace, 320 U. S. 698, 702 (1944)	6
Watkins v. Mississippi State Board of Pharmacy, 170 Miss. 26, 154 So. 277.	16
U. S. ex. rel Strachy v. Reimer, Commissioner of Immigration	17
Vestal v. Commissioner of Internal Revenue, 80 U. S. App. D. C., 264, 152, Fed. (2d) 132	18
Hovey v. Elliott, 167 U. S. 409	18

STATUTES, RULES OF COURT, MISCEL.

Opinion, U. S. Court of Appeals for the District of Columbia Circuit. No. 9965	4
District of Columbia Code (1940), Title 17, Section 101	7
6 Maryland Law Review, 256, p. 261	16

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The petition has dressed this cause of action in such fancy garb and the alleged issues are so definitely beclouded as to make the actual case hardly recognizable.

In view of the petitioner's manner of presentation, and in fairness to the United States Court of Appeals for the District of Columbia, it is no doubt well to go a bit more into detail in giving the "Statement" of the case. We coincide with so much of the petitioners' statement as recites the content of the "bondsman's statute" and as outlines the procedural steps as taken, but feel that same should be elaborated upon as same may be revealing as to why this case, with no fundamental or constitutional ques-

tion involved, finds its way to the highest Court of the land. Small wonder that the case is distorted beyond recognition and that the issues which were really before the Court of Appeals and which unquestionably, by the very language of the Opinion itself, are shown to have actuated the Court in its decision, remain unmentioned.

When the suggestion is not only had but the question is posed as a matter being presented to this Court as to whether the District Court was denied the right of participation in the case it is doubtless proper to outline exactly what the happenings were. To what has been said by the petitioners, additions might well be made. Having heard from an unrevealed source that the licensee, John W. Carter, had been arrested on some previous occasions, Judge David A. Pine first called counsel to his chambers and there made inquiry as to whether or not the licensee was the same John W. Carter who had had the experiences of being arrested, which was answered in the affirmative with a full disclosure and explanation of the arrests involved. Comment might here be made that only one of said arrests was made for an offense involving moral turpitude and not "some" offenses as alleged by the petitioners. On this occasion counsel did explain the interpretation made of the language used in the application, same being that he had never "been charged and/or convicted of a crime involving moral turpitude." This and/or expression, according to the authorities, is to be interpreted in keeping with the context in which it is found. Here it must be remembered that the question being answered was "whether or not he has ever been convicted of an offense involving moral turpitude." Carter has never been convicted of any offense. His counsel explained to Judge Pine that mindful of the question that was being asked, and in keeping with a precedent which has been furnished Carter's counsel by a Clerk in the Criminal Branch of the District Court, he, Carter's counsel, used the expression referred to hereinbefore.

The statement might simply have been made that the

applicant had never been convicted of an offense involving moral turpitude. We begin, therefore, with two fundamental factors—one, that Carter had never been convicted of any offense whatsoever nor indeed had he ever been tried for any offense, and consequently more than met the requirement of the Statute indicating that he should not have been convicted "of a crime involving moral turpitude"; and secondly, the language which was used could in no sense have been treated as an evasion on the part of the applicant or an intended misrepresentation on the part for the apparent reason that the applicant and his counsel could not conceivably have been gratuitously making misrepresentations about a matter which they were not called upon to disclose.

There can be no question, however, that at the time of the conference in the chamber of Judge Pine that there was no misunderstanding about the fact that the John W. Carter who had been licensed was the same individual as the one about whom the Court had gotten this information about certain arrests. Under these circumstances, and with an apparent appreciation that the matter was now being handled by him judicially, the Court summoned the United States Attorney to function for the Court and required the applicant to make answer to a Rule to Show Cause as to why the license should not be revoked. Realizing that nothing was before the Court under these circumstances except the question of his admitted identity as the person mentioned in the aforementioned arrests, counsel for John W. Carter asked Judge Pine to disqualify himself, making a formal application in the form of an Affidavit of Prejudice for that the Judge involved had already decided that the issue was of sufficient importance as to require the issuance of a Rule to Show Cause, definitely showing that his mind was made upon on this matter.

At this stage of the procedure Judge Pine took the position that there being no showing of personal prejudice as far as he was concerned, he would not recuse himself and

that he had no right to avoid the obligation which was his and to transfer the matter for determination to any of the other Judges. We call attention to this fact because further along in the procedures, without there having been any participation of other members of the District Bench in the case, Judge Pine vouched into the case all of the Judges sitting in the Criminal Branch of the Court, all of whom signed the Final Order denying the application of the said John W. Carter. How, we ask, under such circumstances, can the Court now be heard to complain about the interpretation of such an order as being a final judicial order of the Court as against an administrative functioning by a Judge of the said Court where the Statute expressly provides that no person shall engage in the bonding business in criminal cases until his application "shall have been filed and the approval of *one of the Justices* of this Court authorizing him to engage in the bonding business noted thereon." (Italics ours).

Judge Pine was the "Justice of the District Court" to whom this matter was properly presented. If there were any attempted changes from the ministerial function which he was called upon to exercise, it was he rather than any one else who doubtless felt the difference in the situation after the time that the license had once been granted, and from that time forward took steps which of necessity rendered the orders signed as judicial orders, final and appealable in their character. In passing upon the matter before him individually, the Court saw fit to and did use the following language (Opinion, United States Court of Appeals for the District of Columbia Circuit, No. 9965, pp. 3, 4, Decided August 1, 1949, as yet not reported):

> "This matter involves a right of a citizen to engage in the business of writing bonds in criminal cases, and this applicant, according to the record as I have it before me, has made representations of material facts, facts which if they had been disclosed to me prior to the approval by me of the application would, I am sure, have induced me to make further inquiry and investiga-

tion to ascertain whether he is a suitable person, under the law, to engage in this business, of writing bonds in criminal cases. However, the answer to the rule to show cause, and the statements made to me in chambers, at the request of his attorney, disclose that the representation was not made willfully or with a purpose to deceive the Court, but was made on the advice of counsel who informed the petitioner that the language used would not constitute a misrepresentation. To that interpretation I cannot subscribe, and I am of the opinion that a reasonable interpretation of the language used is that it does constitute a misrepresentation.

"Nevertheless, I am led to the conclusion that it was given in *good faith*, partly because of the high standing of the applicant's counsel. I shall therefore pass an order revoking the authorization given by me to the approval of the application." (Italics ours)

Here, and here alone, is the basis of the issue involved. The Court of Appeals, in reversing the lower court, took this sound, legal position (U. S. Court of Appeals Opinion, supra, p. 5):

> "We hold that when an authorization to engage in the bonding business has been approved by the District Court and is outstanding, it can be revoked, prior to the expiration of its term, only upon a proceeding which contains the elements of due process of law, i.e., a hearing and revelation of all data upon which a decision is to be based."

There has never been any pretense on the part of respondent or his counsel that the statutory provisions with respect to requirements for engaging in the bonding business in criminal cases were in any wise questioned. By reason, however, of the attitude assumed in his treatment of the case by the United States Attorney, through one of his Assistants, and by the Solicitor General, the Court of Appeals attempted to make crystal clear the fact that there was no question as to the power or procedure of the District Court in granting authorizations to bondsmen. We quote

the unmistakable language found in the Court's Opinion (U. S. Court of Appeals Opinion, supra, p. 5):

> "Because of the nature of the argument by the United States Attorney, we emphasize two negatives. *The case does not involve the power or the procedure of the District Court in granting these authorizations.* It does not concern the power or procedure of that court in renewing an authorization upon expiration of the stated term." (Italics ours)

The pretended position in the petition for writ of certiorari that the Court of Appeals was in any wise attempting to usurp or interfere with the functioning of the District Court in a procedural matter is not only without foundation, but entirely disregards the issue that is actually in the case and the expressed negativing by the Court of Appeals of the pretended issue upon which reliance is had.

This matter is purely and simply a local question involving nothing other than the right of an individual to the protection of due process of law of a property right granted to him, and any suggestion to the contrary is not sustained by the record. See *District of Columbia* v. *Pace,* 320 U. S. 698, 702 (1944).

In spite of the foregoing, the Solicitor General sees fit to and does, in his petition for writ of certiorari, suggest that there are three questions involved, which he sets forth as follows:

> "1. Whether the District Court's orders, involving an application to engage in the bonding business in that court, are appealable in the Court of Appeals.
>
> "2. Whether the Court of Appeals properly refused the District Court any right to participate or be heard in the appellate proceedings.
>
> "3. Whether the District Court acted within its authority in denying respondent's application to engage in the bonding business in that court."

Let us address ourselves to these questions as posed in the order named.

1. Whether the District Court's orders, involving an application to engage in the bonding business in that court, are appealable to the Court of Appeals.

The District of Columbia Code (1940), Title 17, Section 101, provides:

> "Any party aggrieved by any final order, judgment or decree of the District Court of the United States for the District of Columbia, or of any Justice thereof, may appeal therefrom to the said United States Court of Appeals for the District of Columbia; . . . . and also from any other interlocutory order, in the discretion of the said United States Court of Appeals for the District of Columbia, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal."

In answering the above question, and in interpreting the law under which it functions, the Court of Appeals, in its Opinion, supra, page 5, gives a full and complete answer to the said question in the following language:

> "The United States Attorney urges that the orders entered by the District Court are not appealable. The statute governing appeals allows them in respect to any final order. That means judicial orders, of course. As we have pointed out, the orders in this proceeding were judicial orders and were, therefore, appealable. They were certainly final. The United States Attorney also lays stress upon the fact that there is no appellee. This is a common characteristic of many appealable proceedings, such as disbarments and similar matters."

As hereinbefore pointed out, the District Court was not entering any order in keeping with its admitted administrative function of approving the bondsman's application; its orders on the contrary were in the form of a revocation of an order previously granted, creating a property right.

Here again we find apt language in the Opinion of the Court of Appeals for the District of Columbia Circuit, supra, page 5:

> "It may be true that the grant of authority to engage in the bonding business is an administrative act. But

the deprivation of the right, once granted, is a judicial act, requiring due process of law."

It cannot be gainsaid but that the Order of June 8, 1949, signed by all of the Judges sitting in the Criminal branches denying Carter's application to act as a bondsman was simply an order in futherance of the unlawful and unauthorized order of December 19, 1947 revoking, as the United States Court of Appeals says, without due process of law the action previously taken authorizing said Carter to act as a bondsman and creating, as we continue to emphasize, a property right. A realization of this specific designation of the orders involved as judicial orders renders without point the cases cited on pages 13 and 14 of the Petition for Certiorari, all of which addressed themselves to what must be conceded as being ministerial orders. The citations are not in point and beg the entire question involved.

The language above quoted likewise sufficiently answers the contention of the petitioner that the cause of action did not name any appellee or adverse party. Such procedure, as the appellate court points out, is a "common characteristic of many appealable proceedings" (Opinon, supra, page 5).

In this connection, the caption of this cause—"In The Matter of John W. Carter" found its birth in the Rule to Show Cause which the Court had the District Attorney to issue, functioning on its behalf.

2. Whether the Court of Appeals properly refused the District Court any right to participate or be heard in the appellate proceeding.

It is indeed to us a disturbing element that such a question should be posed in the light of the history of this case, for we are frankly at a loss to know what interpretation is to be given to the word "participation" or to understand upon what theory the suggestion is had that any right was denied the District Court. Perhaps the best answer to this question of participation will be had by a review of the steps

taken in this particular case. Attention has heretofore been called to the fact that from the very outset Judge Pine called into the picture the offices of the United States Attorney to function for the Court in the carrying out of the steps which the Court designated. The Rule to Show Cause issued was prepared by the United States Attorney's Office at the direction of Judge Pine, and one of the United States Attorney's Assistants appeared in court at the time of the "so-called" hearing on the Rule to Show Cause, furnishing the record to the Court of certain charges which had been made against the said John W. Carter, and expressly calling the Court's attention to the fact that no where in the record was there any conviction against Carter or any trial of him ever had on any offense of any kind or character. After having indicated his intention to revoke the authority previously granted, the Court directed the Assistant United States Attorney, who was in attendance, to draw an order of the following tenor, and here we quote the language used by the Court (Brief and Joint Appen., p. 32):

> "The Court: 'Upon consideration of the rule to show cause and the answer thereto, and the proceedings in Court and in chambers, it is by the Court ordered that the approval given on such and such a date to the application be and the same is hereby vacated.' That is all there is to it.
>
> "Mr. Conliff: Yes, I just wanted to verify that.
>
> "The Court: Very well. And, Mr. Conliff, will you keep available this original record you offered (handing down the papers referred to).
>
> "Mr. Conliff: Yes, sir."

Having indicated the type of the formal order which the Court desired prepared for his signature, the Court also authorized the Assistant United States Attorney to make a further investigation. What occurred from that time forward is well expressed by the United States Court of Appeals in its Opinion, supra, page 4:

"The court considered that its action revoking the authorization made the application a pending one. It directed that an investigation be made. Exactly what then happened is not shown by the record, but the brief of the United States Attorney refers to an investigation by his office and by the F. B. I. His later, or supplemental, brief refers to 'information rendered available to the District Court as a result of the inquiry.' Appellant says his information is that an investigation was made, but that the results were not spread upon the record but were sealed by the court and made unavailable to appellant by express instruction given to the clerk. Upon oral argument in this court, it was asserted and not denied that the District Court received a report from the F. B. I. and placed it in a sealed envelope, not to be opened. Counsel for appellant and counsel for the United States Attorney all say that they have not seen and do not know the contents of the report. The United States Attorney, as will later appear, defends the propriety of this course. In any event, Carter filed some twenty-five letters attesting to his character and standing. Six months after the hearing above described, and without further ado, the court entered an order denying Carter's application.

"The United States Attorney, as amicus curiae, defends the action of the District Court. He does so upon the following reasoning: An authorization by the court to a person to engage in the bonding business is a purely administrative act and, therefore, revocable at its will; that such revocation may be made if the court is misled upon the authorization, even though the representations which it deems misleading were made in good faith, not willfully or with purpose to deceive; that the court may revoke for a reason which, if originally known, would have caused it to inquire further; and that when an application has been replaced in a pending status by a revocation order, the court may receive and consider confidential and undisclosed information and, upon such information, deny the application.

"The error in the foregoing reasoning is that it ignores the key and controlling fact in the situation. The application had been granted. Carter had an authorization. He was engaged in business. The action

> of the court was not to deny him something he was seeking; it was to deprive him of something which he had."

From the orders entered by the United States District Court for the District of Columbia, John W. Carter appealed to the United States Court of Appeals for the District of Columbia Circuit; and the United States Attorney, who had been acting for the Court from the very onset, appeared as "amicus curiae," justifying such appearances by the following language:

> "1. There is no appellant in this case, yet the validity of an order of the United States District Court is attacked. The United States has an interest in the correct interpretation of its laws and the sustaining of officials who have acted under the authority of such laws. In order that this Court may have the benefit of the presentation of both sides of the question in which the United States is properly interested, it is appropriate that the United States Attorney be allowed to file a memorandum."

Pursuant to the application so made the United States Court of Appeals passed an order granting leave to the United States Attorney to file a memorandum as amicus curiae and upon the authority thus granted, the United States Attorney did prepare and present to the United States Court of Appeals a brief in opposition to the appellant's brief filed in this cause, and the same duly came on to be heard in the United States Court of Appeals, and same was argued by counsel for the appellant and by the United States Attorney as amicus curiae. Some several days thereafter, and before a decision was had upon the cause as thus presented, the Solicitor General of the United States filed a motion captioned—"Motion of the United States District Court for the District of Columbia for Hearing and Leave to Present Oral Argument." Over objection of counsel for appellant authority was given for participation by the Solicitor General in an order bearing the following language:

"ORDER—Treating the motion filed herein May 29, 1949, by the Solicitor General as a motion for reargument on behalf of *amicus curiae* United States Attorney in this cause, It is

ORDERED by the Court that this case be, and it is hereby, set down for reargument on June 14, 1949 by said *amicus curiae*, who may file an additional typewritten brief on or before June 13, 1949, and appellant may file a typewritten reply brief on or before June 20, 1949. *Amicus curiae* allowed 30 minutes for argument, and appellant allowed 30 minutes to reply.

Per Curiam.

Circuit Judge Clark dissents and will file a memorandum in the matter in a few days.

Dated June 6, 1949."

In keeping with the authority granted in the aforementioned Order, the Solicitor General did file an additional brief, to which a reply brief was duly filed. Prior to the time of the oral hearing being had in the cause, the Solicitor General made application for additional time for argument, and pursuant to said request, the Court granted additional time as will be evidenced by the Order here quoted:

"ORDER—On consideration of the motion of the Solicitor General to clarify and amend the order of this Court entered herein June 6, 1949, and to allow the Solicitor General 45 minutes for argument, It is

ORDERED by the Court that the Solicitor General be, and he is hereby, allowed 45 minutes for oral argument in this case, and that in all other respects the motion to clarify and amend the order of June 6, 1949, be, and it is hereby, denied.

Per Curiam.

Dated June 13, 1949."

It is to be noted that the brief submitted by the Solicitor General was signed—"Philip B. Perlman, Solicitor General, Department of Justice, *Attorney for the United States District Court for the District of Columbia and the Judges thereof.*" (Italics ours.)

Upon the matter being presented in oral argument, and above and beyond the extra time allowed, as granted by the Order hereinbefore quoted, the Solicitor General actually was allowed to argue the case for a period of approximately one hour and fifteen minutes. After the time of a full and complete argument and submission of the matter to the United States Court of Appeals for determination, an additional Memorandum was filed by the Solicitor General.

Under these circumstances, as stated at the outset, we are at a loss to follow the suggestion of the Solicitor General that the Court of Appeals refused the District Court any right to participate or to be heard in the appellate proceedings and especially in view of the fact that having outlined something of the procedure as hereinbefore set forth, the Solicitor General in his own Petition for Certiorari, stated: "The matter was then argued on the merits by the Solicitor General who, according to the Court of Appeals' Opinion, 'reargued on behalf of the United States Attorney as amicus curiae.' "

The matters which were argued on the merits by the Solicitor General are outlined in the written brief filed by him in the cause in his capacity as set forth, as "attorney for the United States District Court for the District of Columbia and the Judges thereof," detailed as follows:

Argument:

I. The appeal should be dismissed.

A. The granting, denial, or revocation, by the District Court, of an application to engage in the bonding business is administrative and nonjudicial in character, and not appealable.

B. If such orders are reviewable at all, it is only by means of a proper proceeding in the nature of mandamus or a mandatory injunction.

II. If reviewable in this proceeding, the District Court's denial of Carter's application should be sustained.

A. The District Court had full authority to revoke, by its order of December 19, 1947, the *ex parte* approval previously given to Carter's application.

B. The District Court thereafter had full authority to pass upon and deny Carter's pending application, as it did in its order of June 8, 1948."

It is immediately apparent that all of the points for which contention is now being made in the petition for certiorari were made and fully discussed by the Solicitor General before the United States Court of Appeals for the District of Columbia, unless, therefore, there be some legerdemain in the caption under which one appears, it can hardly be fairly said that there was not participation by the District Court and its Judges in this matter of appellate review.

3. Whether the District Court acted within its authority in denying respondent's application to engage in the bonding business in that court.

Supportive of the implications of this question the Solicitor General, in giving reasons for the granting of the writ, states as follows:

> "This case presents a decided difference of view between the District Court, affirmatively petitioning this Court on its own behalf, and the Court of Appeals on an important matter directly touching the proper administration of criminal justice in the District of Columbia. As the final authority, by mandate of Congress, in all justiciable matters of judicial administration in the District of Columbia, this Court should definitively resolve the conflict and reestablish the system of licensing bail-bondsmen in the District on the footing Congress intended."

The difficulty about the question and the reasoning is that neither states the issue that is before the Court. It has in no wise been contended by the appellant below or decided by the Court that there was any question as to the

correctness or validity of the procedure as provided for the licensing of bail-bondsmen in the District of Columbia; nor can it in any sense be claimed that what was before the Court and decided by it in any wise touches upon the proper administration of criminal justice in the District of Columbia.

These suggestions of appellee are apparently made to vouch into the case "the unusual character of the present controversy and the nature of the questions present" which the Solicitor General claims justify the granting of the writ in this case. We respectfully submit that there is nothing unusual about the controversy nor about the decision, nor is there anything that removes the case from being a determination of an issue of local law.

The application for the writ of certiorari skirts entirely the sole issue upon which the Court passed, and seems to base its reliance on a proposition not decided by the Court nor contended for by the appellant, and expressly negatived by the Court of Appeals in its decision.

The language of the United States Court of Appeals most aptly and succinctly states the question involved and gives the basis for the decision made. We quote again that language:

> "The error in the foregoing reasoning is that it ignores the key and controlling fact in the situation. The application had been granted. Carter had an authorization. He was engaged in business. The action of the court was not to deny him something he was seeking; it was to deprive him of something which he had."

Under the Statute and Rules, no application for a bonding license may be approved until the Court is assured of the applicant's financial responsibility and moral fitness. Thus inherent in the Order of Court of November 18, 1947 was a determination that appellant possessed the requisite financial responsibility and good moral character. Such a determination was not only tacit in its order for approval

by the Court, but in fact it was the statutory duty of the Court to so find before it granted its approval. Having thus made a determination with respect to good moral character and there being no suggestion that the Court was imposed upon by fraud, it is submitted that the question of appellant's good moral character in this connection was fully adjudicated on November 18, 1947.

As it is stated in *6 Md. Law Review*, 256, p. 261—

> "In the majority of cases if the petitioner has presented in good faith all the available facts, secured a license by virtue of administrative adjudication, and changed his position in reliance thereon, the doctrine of res adjudicata should protect him from a re-determination of the issues."

In *Watkins* v. *Mississippi State Board of Pharmacy*, 170 Miss. 26, 154 So. 277, the Board had granted an applicant a license as an Assistant Pharmacist, the Statute requiring the licensee to be of good moral character. Subsequently the same applicant sought to obtain a license as a Registered Pharmacist. The Board attempted to investigate the applicant's moral character before granting the license. On a petition to the court by the applicant, that court held that the Board was without power to investigate the applicant's character anew, the Court stating—

> "The issuance of this assistant's license by the Board to appellant was a recorded adjudication by the Board that appellant was of good moral character."

And further the Court said—

> "The rule which forbids the re-opening of a matter once judicially determined by competent authority applies as well to judicial and quasi-judicial acts of public, executive or administrative officers and boards acting within their jurisdiction as to judgments of courts."

In the Watkins case the Board contended, much as does the Court below in the instant case, that only a superficial

or casual examination into the question of the appellant's moral character was made in the first instance and that subsequent to issuance of the license, a more thorough investigation was to be made. In casting aside that contention, the Mississippi Court stated—

> "It would be no more competent for a pharmacy board to attempt to set aside its former judgment and thereafter to enter upon a re-examination of the adjudicated question on the ground that a sufficient examination had not originally been made than it would for a Judge of a Court, after adjournment of the Term, to set aside one of his judgments on the ground that it had been rendered upon insufficient evidence . . . . Public judicial and quasi-judicial records must rest upon a more secure foundation than would be the case if any such contentions as the Board now makes were allowed to be held or to prevail."

The United States Court of Appeals for the Second Circuit adopted a like view with respect to an attempted readjudication of a passport visa issued by an American Consul in London. (*U. S. ex. rel Strachy* v. *Reimer, Commissioner of Immigration*). The relator Strachy had applied for and received a passport visa from the American Consul at London and engaged passage on the Normandie. Prior to the time of departure the Consul, on advice apparently from the State Department, sought to revoke the visa and advised the immigrant to delay his embarkation. The immigrant nonetheless retained passage and presented himself at New York where the immigration authorities refused to honor his visa on the ground that he was a member of the Communist Party of Great Britain and had obtained his visa through fraud. After a hearing before a Board of Special Inquiry the visa was cancelled and the immigrant ordered excluded from admission to the United States. Thereupon a writ of habeas corpus was granted on the ground that the Consul had no power to revoke the passport visa; the District Court dismissed the writ and entered an Order remanding the immigrant to the custody of the

Commissioner of Immigration for deportation. On appeal this Order was reversed and Circuit Judge Hand, speaking for the Court, stated—

> "The question before us is whether the Consul had power to revoke the visa after he had issued it and the relator had embarked for the United States. We think that the Consul had no such power and that the Order dismissing the writ should be reversed."

This Court, in *Vestal* v. *Commissioner of Internal Revenue,* 80 U. S. App. D. C., 264, 152, Fed. (2d) 132, reversed a decision of the Tax Court, which decision had permitted the Commissioner to re-determine a deficiency in income tax. Previously the question in the case was whether, under agreed facts, petitioners were liable for the tax as partners or as transferees. The Commissioner first imposed the tax upon the theory that the individuals were liable as partners, and this Court held, in reversing the Tax Court, that the Commissioner is precluded from later asserting that the tax is again due from these same individuals upon the theory they are liable as transferees. It is respectfully suggested that the same rationale which caused this Court to reach the conclusion in the Vestal case is analogous to the rationale of the immediately preceding cases noted above.

On the basis of the foregoing, it is submitted that when the United States District Court for the District of Columbia granted the license to the respondent it effectively judicially determined that respondent was of good moral character, and it was error for that Court thereafter, in a proceeding dealing with the same parties and the same facts and the same questions of fact and law, to undertake to make a new determination of the question of appellant's moral character. The matter is res adjudicata.

Pertinent to and applicable to this situation is the case of *Hovey* v. *Elliott,* 167 U. S. 409. This Court was called upon to determine the effect of an order rendered by the Supreme Court of the District of Columbia at General

Term in a contempt proceeding, which decreed that the defendants' answer be stricken out and removed from the files of the court because of non-compliance on their part with the requirements of a decree previously rendered by the court, and that the cause should then proceed as if no answer had been interposed. It was held that the action of the court was a violation of the Fifth Amendment. Mr. Justice White, in the course of his comprehensive opinion, said:

> "To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." (p. 414)

Again, on page 417, he said, in words which could be well applied here:

> "If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? *If this be true, as it undobtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts*

possess the right to inflict the very wrongs which they were created to prevent." (Italics ours)

It is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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